Supreme Court, U.S.
FILED

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No.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1997

RONALD M. SCHMIDTENDORFF,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

Petition for a Writ of Certiorari to the Wisconsin Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

RONALD SCHMIDTENDORFF
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25 pp

QUESTION PRESENTED

Can "legislative intent" be used to sustain as constitutional an investigatory detention otherwise shown to be longer than necessary to effectuate the law enforcement purposes behind the stop.

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PETITION FOR A WRIT OF CERTIORARI

Ronald M. Schmidtendorff respectfully petitions for a writ of certiorari to the Wisconsin Supreme Court.

OPINIONS BELOW

The unreported order of the Wisconsin Supreme Court denying Petitioner's petition for review is reproduced at 1a of the appendix to this petition ("Pet. App."). The unpublished opinion of the Wisconsin Court of Appeals, reported in the Table of Unpublished Opinions at 208 Wis.2d 373, 561 N.W.2d 352 (Ct. App. 1997), is produced at page Pet. App. 2a. The transcript of the oral decision of the trial court on the issue raised is reproduced at Pet. App. 8a.

JURISDICTION

On April 15, 1997, the Wisconsin Supreme Court issued an order denying the petitioner's petition for review. The statutory basis for this Court's jurisdiction is found in 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A Town of Summit police officer made a traffic stop of petitioner on October 22, 1994 at 2:12 a.m. That officer took possession of petitioner's driver's license, and then received another call. The officer making the traffic stop then left the petitioner and his driver's license in the custody of a Waukesha County sheriff's deputy before departing the scene of the original traffic stop at approximately 2:17 a.m.

Despite the fact that the original stop was made for suspicion of operating under the influence, the Waukesha County sheriff's deputy took absolutely no action to confirm or dispel the suspicions of the Town of Summit officer who had made the traffic stop. Even after a backup officer from

the Town of Oconomowoc arrived at the scene of the traffic stop to assist the sheriff's deputy, he simply retained possession of the petitioner's driver's license, detaining petitioner, and waiting.

Absolutely no action was taken to confirm or dispel the suspicions of the Town of Summit officer who made the original stop until a state trooper arrived on the scene at 2:46 a.m. Petitioner was arrested by the state patrol officer at 3:02 a.m.

Petitioner filed a motion challenging the stop, detention, and arrest, and the issue of the constitutionality of the length of the detention was addressed by the trial court, which denied the motion.

A trial to a jury was held on June 11, 1996, and judgments were subsequently entered upon verdicts of guilt rendered by the jury on both operating under the influence and operating with a prohibited alcohol concentration charges. An appeal was taken to the Wisconsin Court of Appeals, and on January 15, 1997, the Court of Appeals filed a written decision affirming the judgments, resolving the constitutional issue raised without reference to the criteria established by this Court in ***U.S. v. Sharpe***, 470 U.S. 675, 685-86 (1985). Instead, relying upon its perception of legislative intent, the Court of Appeals shifted the burden in the suppression hearing to the defendant to establish, by expert testimony, the unreasonableness of the police conduct at issue.

A petition for review was filed with the Wisconsin Supreme Court, and on April 15, 1997, the Wisconsin Supreme Court issued an order denying review.

REASONS FOR GRANTING THE WRIT

An investigative stop of a motor vehicle is a seizure within the meaning of the Fourth Amendment. ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). It is recognized that the extent of a detention must "be gauged by the reasonableness standard." ***Wendricks v. State***, 72 Wis.2d 717, 725, 242 N.W.2d 187 (1976). Once an investigative detention has been initiated, the rule first enunciated in ***Terry v. Ohio***, 392 U.S. 1 (1968) applies. Wisconsin courts have previously held that such a detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." ***State v. Goyer***, 157 Wis.2d 532, 537, 460 N.W.2d 424 (Ct. App. 1990), quoting ***Florida v. Royer***, 460 U.S. 491, 500 (1983).

In determining whether an investigative detention is too long, relevant factors include the law enforcement purpose behind the stop, and the time reasonably required to effectuate those purposes. ***U.S. v. Sharpe***, 470 U.S. 675, 685 (1985).

The law enforcement purpose behind the detention in the instant case was to confirm or dispel the Town of Summit officer's suspicion that the petitioner was operating under the influence. The suspected offense being investigated was a forfeiture offense, and careful attention must be paid to the permissible parameters of such an investigation under the Fourth Amendment. ***See Welsh v. Wisconsin***, 466 U.S. 740 (1984); ***See also State v. Kiper***, 193 Wis.2d 69, 93-94, 532 N.W.2d 698 (1995).

The time reasonably required to effectuate those purposes is concisely demonstrated in this record by the petitioner's arrest at 3:02 a.m. by a state trooper that did not even arrive on the scene until 2:46 a.m. The petitioner was

detained without justification by the Waukesha County sheriff's deputy for a period of time nearly twice as long as it was subsequently necessary for the state trooper to conduct his investigation. The Waukesha deputy who detained the petitioner at the scene of the traffic stop after the Town of Summit officer left failed to diligently pursue a readily available means of investigation, namely field sobriety testing, that would have quickly confirmed or dispelled the suspicions of the officer who made the traffic stop.

In the context of an OWI stop, the fact that blood alcohol concentrations dissipate over time creates an exigency justifying government intrusion into the very body of a suspect to seize evidence that might otherwise be lost. ***See State v. Bohling***, 173 Wis.2d 529, 537-38, 494 N.W.2d 399 (1993). Wisconsin case law also recognizes that the elimination of alcohol is only half of the metabolic equation. ***See State v. Vick***, 104 Wis.2d 678, 312 N.W.2d 489 (1981). Therefore, exigency is a double-edged sword. Just as the elimination of alcohol may result in the dissipation of inculpatory evidence, the absorption of alcohol over time may increase impairment, making it more difficult for a suspect to turn in an exculpatory performance on field sobriety tests. Wisconsin case law has previously held that

> "in the absence of anything to the contrary, the clear implication of [a requested field sobriety test] is that if one passes the field sobriety test, he or she will be free to leave." ***State v. Swanson***, 164 Wis.2d 437, 448, 475 N.W.2d 148 (1991).

Conversely, refusing to submit to such testing allows the requesting officer to draw an inference of guilt that can provide probable cause for an arrest. ***See State v. Babbitt***, 188 Wis.2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994).

Therefore, a fair opportunity for a detained motorist to demonstrate an exculpatory ability to successfully perform field sobriety tests and end the detention requires law enforcement officers to act diligently lest that opportunity be lost. In this case, the detention of the petitioner exceeded the amount of time reasonably required for the officers involved to exercise the expedient of field sobriety testing as a means of confirming or dispelling any suspicions of impairment. As a consequence, that detention exceeded the permissible scope of an investigative detention under ***Terry***, and all evidence obtained as a result of that detention was obtained in violation of petitioner's Fourth Amendment rights.

In its written decision, the Wisconsin Court of Appeals acknowledged that petitioner's

> "argument rests on the premise that the law technically prohibits excessive concentrations in the *bloodstream* of an intoxicated driver, not the *ingestion* of excessive amounts of alcohol." Slip Opinion at p. 6, Pet. App. at 6a. (Emphasis in original).

There is no suggestion in that Slip Opinion that this premise is not a correct statement of the law.

Instead of applying the controlling criteria enunciated by this Court in ***Sharpe***, the Wisconsin Court of Appeals held against the petitioner on the constitutional reasonableness issue by referring to legislative intent:

> Even if it is possible for a person to consume a series of drinks at a tavern and rush home before the alcohol has time to enter his or her

> bloodstream, we do not believe that the legislature intended that we should account for such risk taking when assessing the reasonableness of police conduct. Slip Opinion at p. 7, Pet. App. at 6a.

It is respectfully submitted to this Court that the intent of the Wisconsin legislature is completely irrelevant to the reasonableness of the police conduct in question under the Fourth Amendment in the context of a warrantless detention and arrest.

The constitutional issue was raised in the trial court and squarely framed on appeal. It was error for the Wisconsin Court of Appeals to disregard the ***Sharpe*** criteria in favor of its own interpretation of the prevailing political will, and the Wisconsin Supreme Court's denial of petitioner's request for review leaves this petition as his only recourse.

A traffic stop is the most likely point of contact between the average citizen, law enforcement, and the justice system. The true significance of this case is the broad shadow it casts upon the Fourth Amendment protections applicable to ordinary citizens, which will be further narrowed should this case be deemed not worthy of review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 15, 1997

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You are hereby notified that the Court has entered the following order:

No. 96-1991 State v. Schmidtendorff L.C. #96-1991

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Ronald Schmidtendorff, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND RELEASED

January 15, 1997 **NOTICE**

No. 96-1991

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD SCHMIDTENDORFF,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

BROWN, J. Ronald Schmidtendorff contends that the police unlawfully detained him during a traffic stop because he had to wait twenty-nine minutes before he was given field sobriety tests. Schmidtendorff argues that the police had no reasonable grounds to allow that much time to elapse. He adds that rapid investigation and decision-making during suspected OWI stops is important because the elapsed time since consumption is an important factor when trying to measure blood alcohol concentration.

We hold that the stopping officer's need to respond to another call was adequate justification for Schmidtendorff's extended prearrest detention. We also reject Schmidtendorff's suggestion that his prolonged detention had a significant and upward effect on his actual blood alcohol concentration by the time he was given field sobriety tests. We uphold the trial court's ruling regarding Schmidtendorff's arrest. We affirm his convictions for operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood alcohol concentration. *See* § 346.63(1), STATS.

We have gathered the facts surrounding the arrest from the suppression hearings. We observe that Schmidtendorff raises no challenge to the testimony of the State's witnesses or to the trial court's analysis of this testimony.

On October 22, 1994, at about 2:10 a.m., a town of Summit police officer saw Schmidtendorff weaving between the fog and center lines along Highway P. After she observed Schmidtendorff nearly hit a stop sign and a semi-trailer parked along the road, she pulled Schmidtendorff over.

After making the stop, the officer approached Schmidtendorff and asked him for identification. While the officer was speaking with Schmidtendorff, she noticed that his eyes were glassy and bloodshot and that there was a strong odor of intoxicants in his vehicle. The officer then took Schmidtendorff's operating license and returned to her squad car. She radioed the dispatcher that she was going to perform OWI testing on Schmidtendorff. The dispatcher responded that a sheriff's deputy was being sent for backup.

However, while the officer was waiting for the

deputy to arrive, she received a call at about 2:17 a.m. regarding a domestic fight in progress about three-fourths of a mile away from the traffic stop. The officer waited briefly for the deputy to arrive and gave him Schmidtendorff's license. She also called the village of Oconomowoc police, seeking back-up for the deputy. She then left the traffic stop and proceeded to the domestic disturbance.

When the officer arrived at the domestic disturbance, she was met by a state trooper who had heard the call over his radio. While the trooper volunteered to assist the officer with the domestic dispute, he also explained that he did not want to make a domestic arrest within the officer's jurisdiction. The officer thus asked the trooper to instead go to the traffic stop and help with that matter. However, because the officer suspected that the person involved in the domestic dispute was somewhat violent, the trooper stayed at the domestic dispute until two sheriff's deputies arrived.

The trooper subsequently arrived at the traffic stop at 2:46 a.m. The trooper immediately began field sobriety testing, which Schmidtendorff failed. On the alphabet test, Schmidtendorff went through "P", slurred and began to mumble, and finished with "W" through "Z." When Schmidtendorff tried the heel-to-toe test, he almost fell over. Schmidtendorff also could not do the one-leg stand past a count of seven or eight. The trooper arrested Schmidtendorff at 3:02 a.m.

The Trial court reached the following conclusions with regard to Schmidtendorff's claim that the twenty-nine minutes between when the officer went to the domestic dispute and the trooper returned to finish the investigation (2:17 a.m. to 2:46 a.m.) was unreasonable. In light of the limited number of available personnel, the trial court found that the officer made a reasonable choice when she decided

to leave the traffic stop and attend to the nearby domestic disturbance. In making this ruling, the court considered the comparatively greater "citizens' safety issues" involved with a domestic dispute. The court also determined that the deputy who remained on the scene did not act unreasonably by not proceeding with testing himself since the officer told him to wait for instructions. Moreover, the trial court recognized that the officer's other alternative, letting Schmidtendorff leave the scene while she attended to the domestic disturbance, would have created its own "citizens' safety issues" resulting from Schmidtendorff's suspected intoxication. In sum, while the trial court acknowledged that the officer could have possibly limited Schmidtendorff's waiting time by ordering the deputy to proceed with field testing in her absence, in light of the "coincidences" of that evening, the court could not conclude that the twenty-nine minutes of detention was unreasonable. Continuing further, the trial court also determined that the trooper, based on Schmidtendorff's performance on the field sobriety tests, had probable cause to arrest.

Schmidtendorff now renews his allegation that this detention was unreasonable and hence unconstitutional. We independently review the circumstances of the case when assessing such constitutional questions. ***See State v. Goyer,*** 157 Wis.2d 532, 536, 460 N.W.2d 424, 425 (Ct. App. 1990).

The question of whether the police wrongly detained an individual prior to arrest is governed by the standard of "reasonableness." ***See State v. Wilkens,*** 159 Wis.2d 618, 626, 465 N.W.2d 206, 210 (Ct. App. 1990). In light of this standard, Schmidtendorff's basic appellate contention is that it was "unreasonable" for the police to make him wait twenty-nine minutes before administering the field sobriety tests.

The evidence that the State placed before the trial court, however, reveals that the delay was the result of specific concerns and circumstances, namely, public safety, officer safety and staffing. The stop took place in a lightly developed area. Thus, the four police forces involved had to work together and make judgment calls about how to allocate personnel. The delay that Schmidtendorff experienced stemmed from police efforts to apply their resources in a manner that best ensured public and officer safety. We join in the trial court's determination that the choices the officers made that evening were reasonable in light of the circumstances.

Schmidtendorff next raises what he terms a separate argument. He captions this argument, "The metabolism of alcohol by the human system requires rapid action in suspected OWI cases." Here, he explains that a person can ingest alcohol without immediate impairment because alcohol does not instantly pass into the bloodstream. Schmidtendorff thus suggests that we should pay special attention when assessing the "reasonableness" of extended police detention in traffic stop scenarios because it may be more difficult "for a suspect to turn in an exculpatory performance on field sobriety tests."

This argument rests on the premise that the law technically prohibits excessive concentrations in the *bloodstream* of an intoxicated driver, not the *ingestion* of excessive amounts of alcohol. Still, we are concerned with the implications of how Schmidtendorff believes that this distinction should figure into the "reasonableness" of police decision-making. Even if it is possible for a person to consume a series of drinks at a tavern and rush home before the alcohol has time to enter his or her bloodstream, we do not believe that the legislature intended that we should account for such risk-taking when assessing the

reasonableness of police conduct.

More to the point, if we nonetheless accept the prima facie plausibility of this second argument, Schmidtendorff does not buttress his theory with any facts, much less expert opinion evidence. He does not direct us to the portions of the record indicating how the twenty-nine minutes of detention caused him to be more intoxicated when he took the sobriety tests than when he was first stopped. We have reviewed the transcripts and have identified where Schmidtendorff raised this possibility.[1] However, we do not see where he presented evidence necessary to this defense, such as how much alcohol he consumed that evening, at what time he consumed it, and an expert opinion detailing how his body processes alcohol. We therefore reject Schmidtendorff's claim that the "extra" twenty-nine minutes of detention made a difference.

By the Court.--Judgments affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

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[1] Schmidtendorff's counsel stated:

I guess the final argument I'd make and I'll be brief on it, is that based on [the trooper's] testimony, what he did, basically, his observations would support an arrest, but they are so far removed from the time of the stop and there is no statutory or common law presumption that--that field sobriety test[s] done forty-five minutes later have any bearing on the person's ability to drive at the time of the stop.

I would argue that his observations are essentially irrelevant in the determination that the court has to make due to the lapse of time.

TRIAL COURT DECISION

THE COURT: We are back in court. Parties are before the court and I'm satisfied that this is not a Dunaway case.

This is what we have here: We have a situation in which an officer was required, after making a stop for OWI, certainly on reasonable suspicion, to stop the gentleman. This is not a paper charge. This is not a warrant.

This is a matter where his condition at that very moment is not only of interest, but is alleged to be at fault by the officer, at least by her reasonable suspicion, and she, in her position, is contacted and asked to leave the scene to go to another incident, for no fault of her own. She's just by virtue of her job.

While she's gone, apparently his license has been passed off to a deputy who remains on the scene but did nothing else.

Now, the burden of proof is the State's, but as the defense says, I suppose we can assume by the virtue that no one else testified, that nothing else happened, so I'm ready to leave this gentleman sitting at the side of the road in his car and stopped there on the reasonable suspicion of the officer who had reason to believe that, and why? Because she smelled the smell when she stopped him. She saw the eyes and to her they were indicative.

Now had this gentlemen not been able to perform field sobriety tests, I suggest to you that she could have arrested for probable cause on the spot, because she saw a driving that she considered reprehensible, followed him, testified that he almost swayed into a sign in his effort to

stop and almost hit a semitrailer.

I'm sorry, sir, but that's what she testified to. Whether that's true is another issue that comes out on trial, but the question is did she have from what the testimony that I have so far -- did she have reasonable suspicion to stop? Yes. And if she'd have said it, and there could have been nothing else, she probably had probable cause to arrest at that point, but she didn't. She left him sitting there, his license passed off, and under Dunaway and the discussion of Terry stops and the timely factor of being--making the least intrusive stop necessary under the circumstances, my conclusion is it would not have been reasonable at that point to allow this individual back on the road.

Could she have arrested? Yes. Did she arrest? No. She sent someone back to the scene to do an OWI field test set. He came about twenty-six minutes--is it twenty-six minutes after she left the scene?

MR. WITT: Twenty-nine, perhaps, but that's--

THE COURT: Twenty-nine. Certainly the tests that were taken, the stops that were done, we are talking well within a three hour period here.

The question is what was it reasonable for this officer to have done and I'm trying to figure out what the other two were doing out on the road with no--no testimony on--on the subject. I have no idea why he would have been allowed to sit there that long.

But if they had been advised that she would be sending someone else back, it's not unreasonable under the circumstances, because the other circumstances was to quickly arrest him and she didn't have time to do that because she would have had to have processed him through,

taken him in, and what was he doing during this time period? Was he subjected to testing? No. We don't think so. There is no testimony. He wasn't subjected to interrogation. He wasn't Mirandized. He wasn't told he was under arrest. He apparently was allowed to sit at the side of the road and when Officer--when Trooper Llanas came Trooper Llanas took this up.

This is questionable. I mean it certainly better not be happening out there every night. I certainly do hope that the circumstances are that the officers would react and it would be--follow into more routine procedural fashion than we are seeing here.

The officer, I believe, testified that there weren't many people on. She was available. She had to return. It was a domestic abuse. You don't know what you're going to encounter, likely violence, when you're dispatched to such, and that there were citizens' safety issues.

There were citizens' safety issues at all times when she was dispatched back to that driveway where she first encountered this gentleman in his vehicle, and there were citizen safety issues if she had allowed this gentleman to depart.

She didn't believe, apparently, that she could process and arrest and so she didn't. She tried to do the next best thing, which was to bring someone to the scene.

I really suggest that it would be inappropriate to believe that this all should take twenty-nine minutes, under--under the circumstances, but this confusion of--of coincidences coming in together tonight, that--that night, including officer Llanas being dispatched after he reported to the scene of the domestic abuse calling, and then was told

by Sergeant Hayne to go back to the scene of the highway stop, leads me to believe that somehow she knew that those sobriety tests hadn't been given.

She knew it hadn't been done by herself, but hadn't been done by her backup, either, and while it's peculiar, it would have been more peculiar under these circumstances where she thought that she had an intoxicated driver to allow him to leave or to order his arrest by someone who hadn't perceived the other and wasn't going to do the field sobriety test.

The fairer thing to do for this individual was to have someone administer those field sobriety tests and see whether on the basis of the administration of that there was probable cause to arrest than to offer the chemical test which was done.

If this were a situation he was held, ordered handcuffed, questioned further at the side of the road, I might feel otherwise, and then just ordered to remain there, not allowed to go.

He was allowed to remain there and told that someone would be coming to do these tests and he did remain, being a good citizen, hopefully, he remained. He did not make the situation worse and was dealt with appropriately.

Officer Llanas testified it was appropriate. Didn't do the tests well. On probable cause, he forgot, I believe the letter T, he stepped off a couple of steps on the walking heal to toe. On the one leg stands he was not able to hold his leg up for the requisite period of seconds.

I believe officer testified he couldn't hold his leg up

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higher than seven to eight seconds, and officer had asked for a different level.

So along with that Officer Llanas testified credibly he determined at that time that there was--there was probable cause to arrest for what he saw at that time.

Now putting all those things together even under these strained circumstances, three sets of officers involved here, the court is satisfied that there is still probable cause to arrest him and that the detention under the circumstances in this case did not amount to an arrest without probable cause, although I really do believe---I do believe this officer--Sergeant Hayne, never made a determination to arrest.

She made a determination to give those tests and was called away--or to have the tests given, to be fair, and that on its--that's where we leave it.

The circumstances certainly are strained, but I don't believe it eliminates the probable cause that--that Trooper Llanas did find, and stringing these two together with the two officers.

In between that second team Voss and the other name, which does not come to mind, they don't have--appear to have been done anything that I can see at this point, including anything that would suggest further circumstances of arrest, without probable cause, so on that basis I sustain and refuse to suppress, here.

This will be set for jury trial and of course all issues are preserved.